No. 21 839

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

DONALD E. BARKER,)

Appellant,)

vs.)

GRACE LINE, a corporation,)

Appellee.)

APPELLANT'S OPENING BRIEF

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I

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of dismissal on the pleadings and from a jury verdict. The action is one for personal injuries sustained by a merchant seaman while a member of the crew and in the service of an American Flag vessel. Jurisdiction of the Federal court exists by reason of the Jones Act (28 USC §1916 Article III of the Constitution of the United States). This court has jurisdiction of appeal herein pursuant to 28 USC §1291.

II

SPECIFICATION OF ERRORS RELIED UPON

The errors upon which appellant relies are as follows:

1) The trial court erred in granting appellee's motion for judgment of dismissal on the pleadings of the third cause of action and dismissing said cause of action.

2) The trial court erred in deleting portions of appellant's requested instructions numbered two, six and twenty-eight. In each of which the jury was not apprised of the legal effect of certain factual situations set forth in each of the instructions. And the trial court further erred in failing

to give appellant's requested instructions numbered seventeen and twenty-four.

III

THE FACTS

This is an action for personal injuries sustained May 22, 1965 while appellant, a purser and member of the crew of the American Flag vessel *Santa Flavia,* owned by the appellee was injured at the port of Manzanillo, Mexico. The vessel arrived at pilot station at 8:30 in the evening and was finished with engines (meaning fast to the berth) at 9:30. (R.T. 11) The vessel cleared with customs at 9:34 (R.T. 13) and about 10 o'clock of that night appellant, having been informed by another member of the crew that he had been given a good hair cut in town, determined to go ashore in order to get his hair cut (R.T. 14). It was dark (R.T. 15) and no instructions had been given as to any dangers attendant to the use of the pier, nor route to take (R.T. 16). Appellant descended the gangway and, as cargo was being worked, in order to stay clear of the boom he started down the dock between railway tracks (R.T. 18). As he walked down the pier appellant could see directly ahead of him an entrance way from the pier to the street (R.T. 19).

The pier was lighted by the ship's light and by lights on the warehouse (R.T. 19/20). Appellant fell when coming from an illuminated area to a dark area (R.T. 65). The master of the vessel describes the place where appellant fell as "very dark" (R.T. 128). Appellant fell in a hole which the master describes as two feet deep and two feet in diameter (R.T. 129/130). This hold is variously described by appellant as being 75 - 100 feet from the bow of the vessel and 150 feet from the bow of the vessel (R.T. 67).

Appellant testified that when a vessel pulls into port it is customary to post warnings of known hazards (R.T. 40), but in this particular case as purser he was not advised to post notice nor was he warned of the danger attendant to the use of this pier (R.T. 41). Appellant's testimony with respect to the custom of posting warnings relative to dangerous conditions ashore is corroborated by the testimony of Capt. Brown (R.T. 107) who has been a licensed mariner for some twenty years (R.T. 94).

By reason of the fall into the hole appellant sustained the injuries which give rise to the instant litigation.

IV

THE PLEADINGS

Appellant's complaint sets forth five causes of action. The first of these is in negligence for failure to provide him with a safe and proper means of access to and egress from the vessel. The second cause of action charges appellee with negligence in failure to provide proper medical care for the injuries sustained by appellant. The third cause of action sounds in unseaworthiness for failure to provide appellant with safe and proper means of access to and egress from the vessel. The fourth cause of action asserts a claim for unseaworthiness due to failure to provide appellant with the necessary and proper medical care and attention. The fifth cause of action is for maintenance and cure.

This appeal concerns itself only with the first and third causes of action. The cause of action for maintenance and cure was withdrawn. The jury finding on special interrogatories (C.T. III) that appellee provided necessary and proper medical attention and did not err in failing to relieve appellant of his duties as purser, is not challenged.

V

PROCEEDINGS BELOW

Prior to trial appellee made a motion for judgment of dismissal on the pleadings as to the third and fourth causes

of action and for summary judgment of dismissal as to the first cause of action (C.T. 38). The motion was denied as to the first and fourth cause of action but appellee's motion for judgment of dismissal on the pleadings as to the third cause of action was granted and said cause of action was dismissed (C.T. 99).

The case was tried as to the first, second and fourth causes of action by the court sitting with a jury and a verdict returned in favor of appellee (C.T. 110). The following special interrogatories were each answered in the negative:

> COUNT I:
>
> a. Was defendant Grace Line Inc. negligent in connection with the condition of the adjacent dock?
>
> b. Was defendant Grace Line Inc. negligent in failing to warn plaintiff Donald Barker of the condition of the dock?
>
> COUNT II:
>
> a. Was defendant negligent in failing to provide necessary and proper medical care and attention?
>
> b. Was defendant Grace Line Inc. negligent in its failure to relieve plaintiff from his purser's duties after injury?
>
> COUNT IV:
>
> a. Was defendant's vessel unseaworthy in failing to supply necessary and proper medical care and attention?

b. Was defendant's vessel unseaworthy for failure to relieve plaintiff from his duties?

Appellant made timely motion for new trial (C.T. 211) which was denied, and notice of appeal (C.T. 213) was timely filed.

VI

ARGUMENT

The errors specified require a reversal of the judgments entered herein.

VII

SUMMARY OF ARGUMENT

The court erred in dismissing the third cause of action -- the one in which appellant seeks to recover on the basis of unseaworthiness for failure to provide him with safe and proper means of access to and egress from the vessel. The argument respecting this error may be summarized as follows:

1) The duty to provide a seaworthy vessel includes the duty to provide a safe place for the crew member to work.

2) A vessel may be rendered unseaworthy by reason

of dangerous conditions ashore which render the place in which the seaman works unsafe.

3) Failure to provide a safe method of access to and egress from the vessel will render it unseaworthy.

4) Appellant was on the business of the ship at the time of his injury and hence entitled to a seaworthy vessel.

Whether or not an unseaworthy condition existed by reason of the presence of the hole in which appellant fell was a question of fact to be determined by the jury. The jury might have found that the condition was not dangerous, that the lighting was adequate, that appellant was not pursuing a proper route or upon some other basis decided the case adversely to appellant. But these were factual determinations which appellant was entitled to have tried as factual issues and not to have determined summarily as a matter of law. The law is, of course, well settled that where there is any factual question a summary judgment should not be granted. For instance the court said in *Great Northern Railway Co. vs Commodity Credit Corp.* (D.C. Minn. 1958) 163 F. Supp. 447:

> "A motion for summary judgment is an extreme remedy and it should be granted only in the absence of genuine material fact issue. The burden is upon the movant and all doubts must be resolved against the moving party."

And in *Circelli vs Braunsten,* (D.C. Del. 1958) 165 F. Supp. 168, 171:

> "Summary judgment will not be granted unless plaintiff cannot recover under any conceivable set of facts which might be proved."

And in *Union Carbide Corp. vs Hicks Express Inc.*, (D.C. Del. 1958) 162 F. Supp. 612, 613:

> "A motion for summary judgment is granted reluctantly and only in very clear cases."

The thrust of appellant's second assignment of error is that the court, in deleting portions of instructions proposed by appellant and in failing to give others did not fully apprise the jury of the applicable law, to the appellant's detriment.

For these reasons it is urged that the judgment of dismissal as to the third cause of action be reversed and that the verdict rendered by the jury on the first cause of action be set aside and new trial ordered on this cause of action.

VIII

THE DOCTRINE OF SEAWORTHINESS

This court speaking through Denman, Ct. J., said almost thirty years ago:

> "The seaman injury cases indicate a growing area of responsibility of the owner in expansion of the meaning of the word "seaworthiness"

> historically corresponding with the changed conditions of seamen from the sailing vessel to the modern steamship. The latter, insofar as concerns the engine crew, is like a shore power house, plus a constantly shifting floor and walls and machinery, in the motion of the vessel. With these changed conditions we are no longer required to consider the sailor as an adventurous athlete assuming the risk of the rigging and yards as an expected and accepted incident of his employment. Applying the obligation of the ship of the very early cases to these modern conditions would be like saying that, because when lime juice and other antiscorbutics were unknown as preventives of scurvy, a vessel sent to sea without them was seaworthy, a vessel is now seaworthy if going on a long voyage without preventives of scurvy and a diet producing it."
>
> *The Diamond Cement* (9th Cir. 1938) 95 F. 2d 738, 1938 AMC 757, 762.

The growing area of responsibility of the shipowner referred to by Judge Denman is a normal development from the origin of the doctrine of seaworthiness as enunciated in *The Osceola*(1903) 189 US 158, 23 S.Ct. 483. Too often lawyers are inclined to equate seaworthiness with staunchness of hull, appliances, gear and manning reasonably fit for the intended purpose. What Mr. Justice Brown said in *The Osceola* was somewhat different (189 US at 175, 23 S.Ct. at 487):

> ". . . The law may be considered as settled upon the following propositions:
>
> "1. . . .
>
> "2. . . . That the vessel and her owner are, both by English and American law, liable

> to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff vs Metcalf,* 107 NY 211."

It is significant to note that the court in *The Osceola* made a distinction between *unseaworthiness of the ship* and a failure to supply and keep in order the proper appliances appurtenant thereto. Thus it would appear that Mr. Justice Brown had in mind an obligation of the shipowner considerably broader than merely supplying a stout hull and proper appliances, gear and appurtenances. It is perhaps relevant to look to the cases relied upon by the court in *The Osceola* and other cases decided prior thereto to determine what the court had in mind.

Scarff vs Metcalf, (Court of Appeals, N.Y. 1887) 107 NY 211, 13 N.E. 796, was an action by a mate injured aboard a ship. So far as appears from the reported decision, no liability attached to the ship by reason of the injury itself. The mate was given treatment from the medicines available in the ship's medicine chest and no complaint appears by reason of the manner in which such treatment was rendered. When the vessel reached port, a shoreside doctor was consulted who advised that surgery was necessary and should be performed immediately. The master failed to put the mate ashore but kept him aboard the ship until the ship made its return voyage.

Then the mate was hospitalized and surgery performed. Because of the delay in surgery an amputation was necessary. The following appears at 13 NE 797:

> ". . . When he (the seaman) falls sick or suffers injury, the owners owe to him the duty of rendering such care and medical aid as circumstances permit . . ."
>
> ". . .
>
> ". . . But when that duty is not performed, and the seaman suffers injury from the neglect, the ship in a proceeding *in rem* and the owners in a suit against them, are liable for the injuries suffered . . ."

While *The Osceola* is regarded as the landmark case in establishing liability on the part of the ship for failure to provide a seaworthy vessel, it is merely the culmination of over one hundred years of development of this legal basis of liability. The overture commences in 1789. The earliest case that counsel has been able to locate is *Dixon vs The Cyrus*, (D.C. PA. 1789) Federal Case 3930, 7 Fed. Cas. 755. This was an action by a seaman to recover wages for the voyage. At the commencement of the voyage, the vessel was not equipped with proper or sufficient rigging. The crew refused to sail and the ship was held up two days before she finally got underway. The vessel finally sailed and the crew made do with the original rigging. At the completion of the voyage, the vessel refused to pay the crew members their wages on the grounds that the

crew members had violated their contract and forfeited wages by their refusal to sail. The Court held that the law implies that the ship will, at the commencement of the voyage, furnish proper, necessary and customary requisites for the voyage -- i.e. *that she shall be seaworthy.* The Court found the vessel to be unseaworthy and hence, the refusal of the crew to sail was not a breach of their contract.

In the wake of *Dixon* are three significant cases. The first of these is *The Wanonah* (D.C. ME. 1875) Federal Case No. 17412, 29 Fed. Cas. 697. This was an action to recover three months' extra statutory wages provided for in cases where seamen became stranded when the vessel was sold in a foreign port. The statute specifically provided that no extra wages would be payable where the discharge was occasioned by reason of the vessel being wrecked, stranded or unfit for service. In *Wanonah,* the vessel was unseaworthy at the commencement of the voyage because of her age and lack of repair. She encountered a storm, sprang leaks, and put into the closest foreign port. There it was determined that the cost of rendering her seaworthy was disproportionate to her value and she was sold. The Court held that the duty to provide a seaworthy vessel was paramount. That although the general rule is that seamen are not entitled to wages where no freight is earned,

such rule is inapplicable for failure to earn freight is the fault of the master or owner.

The next case in the wake of *Dixon* is *The Heroe,* (D.C. Del. 1884) 21 F. 525. This was an action to recover for wages. The vessel put to sea but because of difficulty with the engines, she returned to port. Libelants left the vessel and seeked to recover their full wages. The Court said at page 528:

> "It is not denied that unseaworthiness releases a crew and they will become entitled to their full wages for the remainder of the voyage. . ."

The third significant case following *Dixon* is *The Noddeburn,* (D.C. Ore. 1886) 28 F. 855. That was an action by a British seaman against a British vessel for injuries sustained while on the high seas due to a fall resulting by reason of a defective rope in the rigging giving way. The Court held that he was entitled to recover against the vessel for his injuries on the basis of unseaworthiness.

Dixon and its progeny are not relied upon by the Court in its decision in *The Osceola.* However, in addition to *Scarff vs Metcalf,* (Supra.) the Supreme Court does refer to five cases which are of significance. They are as follows:

The Edith Godden, (D.C. S.D.N.Y. 1885) 23 F. 43. In this case an injury was sustained when gear gave way while

lowering a boat to the deck of a ship. The Court found the cause to be a strain due to lowering so heavy a weight in a rolling sea. The following appears at page 45 of the Opinion:

> ". . . The machinery must therefore be deemed itself insufficient for the use to which it was applied, under the particular circumstances where it was used. . . the owners must be held answerable for any insufficiency of the derrick for the use to which it was necessarily subjected under the more hazardous circumstances at Port Maria. Their legal duty, by the municipal law, was to exercise due care in providing machinery adequate and proper for the use to which it was to be applied and to maintain it in like condition. (Citation)"

Olson v. Flavel, (D.C. Ore. 1888) 34 F. 477. This was an action for personal injuries suffered by a mate who while engaged in wheeling coal in a barrow over a narrow plank, one end of which rested on the dock, the other end on the vessel, fell and suffered a fracture of his leg. The Court in holding the vessel owner liable does not clearly state the basis of liability but a fair interpretation would be that liability was imposed by failure to provide a safe place to work.

The A. Heaton, (Cir. Ct. D. Mass. 1890) 43 F. 592, where the Court said at page 594:

> "The case is thus resolved into the question of law, whether a seaman, permanently injured in the performance of his duty on shipboard in consequence of the negligence of a

> master in not keeping a rope in proper condition and repair, can maintain a libel in admiralty against the ship to recover damages for the injury beyond his wages to the end of the voyage and the expenses of his cure. . ."

The question was answered in the affirmative.

The liability of the shipowner for failure to provide a reasonably safe place to work is recognized in *The Bark Cann,* 2 F. 241 (2nd Cir. 1880) where the Court said at page 245:

> "I proceed, therefore, to the inquiry whether the owner of this ship . . . became charged with any duty to the Libelant in respect to the stowage of the dunnage and plank that caused the injury in question. It was so arranged, that from its nature, it was dangerous to all persons who might be in that part of the between decks . . . The danger arose not from any use of the thing, but from the thing itself.
>
> "Such being the character of this structure in case the mast was not properly secured, if the Libelant was in the between decks of this ship in the exercise of a right to be there, the shipowner owed him a duty to see that dunnage and plank was properly secured, which duty was not properly performed.
>
> "The Libelant had, therefore, a right to be where he was; and it follows that there was a duty on the part of the owner to protect its falling upon him of its own weight."

The Frank & Willie, (D.C. S.D.N.Y. 1891) 45 F. 494, where the Court said at page 496:

> ". . . But the case shows that the mate, after notice of the dangerous condition of the pile of lumber, which his own unskillfulness or negligence had brought about, and after complaint made at least an hour before the accident, refused to take the usual precautions to make the pile safe, and, in effect, required the Libelant to continue to work in this dangerous condition. This was a breach of a duty owed by the ship and owners to the seamen for which the ship and owners are liable. Employers are required to provide workmen with necessarily safe conditions for work, according to the nature of the business and to the customary provisions for the safety of life and limb. . ."

The Julia Fowler, (D.C. S.D.N.Y. 1892) 49 F. 277, involved injuries to a seaman by reason of a fall from a mast where a defective rope broke. The Court held he was entitled to recover where the mate has been told of the defect.

A fair appraisal of what constitutes unseaworthiness in the light of the foregoing cases and as the law existed at the time of the pronouncement of the second proposition in *The Osceola* is that unseaworthiness consists of a failure to provide a seaman with a safe place in which to work.

A vessel is rendered unseaworthy by reason of dangerous conditions ashore which render the place in which the seaman works unsafe.

The concept of seaworthiness is one of status rather than situs. The shipowner's duty to provide the maritime worker with a safe place in which to work springs from the maritime services being rendered rather than the place where they are rendered. This is epitomized by the Court in *De Salvo v. Cunard Steamship Co. Ltd.*, (U.S.D.C. S.D.N.Y. 1959) 171 F. Supp. 813. In *De Salvo* a baggage chute was improperly positioned on the dock alongside appellee's ship which resulted injury to a longshoreman working on the dock. The jury returned a verdict for appellant on the basis of unseaworthiness. Defendant made a motion for a new trial which was denied. In denying the motion the Court said (171 F. Supp. at 819):

> "The 'recent rapid development of the law in the area of maritime torts' (*Palermo v. Luckenbach Steamship Company*, [2 Cir.] 1957 A.M.C. 1733, 246 F.2d 577, 599 reversed 355 U.S. 20, 1957 A.M.C. 2275) is strikingly illustrated by the expansion of the admiralty concept of 'unseaworthiness', a remedy that 'is judicially rather than legislatively created.' *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 1958 A.M.C. 1754.
>
> "The more recent cases in the area of 'unseaworthiness' suggest strongly that the emphasis has shifted from *situs to status from geography to policy*. While the cases are suggestive of a 'common principles of decision or method of approach to the problem', there is no discernible 'simple formula' for reaching the correct conclusion (citation).
>
> "The doctrine of unseaworthiness has been extended by the Supreme Court to cover certain

> shore-based workers on the ground that, under certain circumstances, a longshoreman, stevedore or other harbor workers may be performing work traditionally done by seamen; and, consequently, if injured, may sue the shipowner (citation).
>
> "Unseaworthiness recovery may be available even where, as here, the injury is not on shipboard but occurs when the longshoreman on the pier is engaged in loading or unloading the ship or performing similar services handling the ship's equipment (citations)." (Emphasis added)

In *Huff v. Matson Navigation Company*, 9th Cir. 1964) 338 F. 2d 205, 1964 A.M.C. 2219, this Court had before it the question of whether liability for unseaworthiness could be created by reason of defective shore-based equipment. This Court recognized that the function of the doctrine of unseaworthiness was to place the cost of injuries to those engaged in the ship's business upon the one best able to minimize the risk -- the shipowner. After reviewing cases applicable to the problem before it, this court said (1964 AMC 2227):

> "And finally, in *Italia Soc. v. Ore. Stevedoring Co.*,[1] the Court held that the stevedoring company was liable over to the shipowner for the unseaworthiness of the ship created by the stevedoring company, even though no negligence on the part of the stevedoring company was shown. It was in that case that the Court used the language we have quoted above describing the shipowner's liability to longshoremen for

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[1] 376 U.S. 315, 1964 AMC 1075.

> unseaworthiness in the type of cases we have here been discussing. The Court there also expounded the rationale of this whole series of cases as follows: (376 U.S. p. 324, 1964 A.M.C. p. 1083) 'Where the shipowner is liable to the employees of the stevedore company as well as its employees for failing to supply a vessel and equipment free of defects regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations. ***[W]e deal here with***an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the company whose default caused the injury, *Reed v. Yaka*, 373 U.S. 410, 414, 1963 A.M.C. 1373, 1377, we think our decision today is in furtherance of these objective.' These objectives were stated in footnote 10, 376 U.S. page 323, 1964 A.M.C. page 1082, of that opinion, by quoting from *DeGioia v. United States Lines*, (2 Cir.), 1962 A.M.C. 1747, 1753, 304 F. (2d) 421, 426, as follows: 'The foundation of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved.'"

The significance of this Court's holding in *Huff* is emphasized in *Spann v. Lauritzen*, (3rd Cir. 1965) 344 F. 2d 204, 1965 A.M.C. 1192. Here again the Court recognized that the touchstone of liability was not whether the defective

condition was aboard the vessel, but rather whether the risk incurred fell within the hazard of the ship's service. *Spann* represents the other side of the *Huff* coin. In *Spann*, plaintiff, a longshoreman, was working ashore operating a shoreside hopper in which a shorebased crane dropped cargo which it had removed from the vessel. Plaintiff sustained injury through an alleged malfunction of the hopper. In holding that the warranty of seaworthiness was applicable the Court said (1965 A.M.C. 1197):

> "It has long been held that the warranty of seaworthiness extends not only to the vessel itself in its hull, gear and stowage, but also to its appurtenant appliances and equipment. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 99, 1944 A.M.C. 1, 4 (1944); *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 213, 1963 A.M.C. 1649 (1963). Since the purpose of the doctrine is to protect those in the service of the vessel, the question whether a particular case falls within the scope of the warranty of seaworthiness is answered by determining *whether risk incurred falls within the hazard of the service*. As said in *Sieracki:* '[Liability for unseaworthiness] is essentially a species of liability without fault. *** Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. *** It is a form of absolute duty owing to all within the range of its humanitarian policy.'
>
> "On principle *** this policy is not confined to seamen who perform the ship's service

> under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. (328 U.S. pp. 94-5, 1946 A.M.C. p. 704-5)
>
> "Accordingly the Court has rejected the claim that the shipowner is not responsible for defects in equipment because it was owned and operated by the stevedore rather than by shipowner and was only temporarily aboard the vessel. *Alaska Steamship Co. v. Pettersen*, 347 U.S. 396, 1954 A.M.C. 860 (1954); *Rogers v. United States Lines*, 347 U.S. 984, 1954 A.M.C. 1088 (1954). In *Sieracki, Pettersen* and *Rogers* the injuries were sustained aboard the vessel by equipment connected to it. Recently in *Gutierrez* the Court expressly held 'that the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier' (373 U.S. p. 215, 1963 A.M.C. p. 1656.)" (Emphasis added)

See also *Deffes v. Federal Barge Lines*, (5th Cir. 1966) 361 F. 2d 422, 1966 A.M.C. 1450.

In *Gutierrez v. Waterman Steamship Corp.*, (1963) 373 U.S. 206 1963 A.M.C. 1649, a longshoreman working on the docks sustained injury when he slipped upon beans which had fallen during the discharge of cargo from the vessel. The Court recognized one of the problems presented as "whether the shipowner's warranty of seaworthiness extends to longshoremen

on the pier who are unloading the ship's cargo" (1963 A.M.C. 1654). The Court answered the question in this manner (1963 A.M.C. at 1656):

> "The second question is one of first impression in this Court, although other federal courts have already recognized that the case law compels this conclusion. *Strika v. Netherland Ministry of Traffic*, 1951 A.M.C. 84, 185 F. (2d) 555 (2 Cir., 1950); *Robillard v. A. L. Burbank & Co.*, 1962 A.M.C. 536, 186 F. Supp. 193 (S.D.N.Y., 1960); see *Pope & Talbot, Inc. v. Cordray*, 1959 A.M.C. 603, 258 F. (2d) 214, 218 (9 Cir.) In *Strika*, while the longshoreman was working on the dock, use of an improper wire cable caused a hatch cover to fall on him. Building on such cases as *O'Donnell v. Great Lakes Co.*, 318 U.S. 36, 1943 A.M.C. 149, where seamen recovered under the Jones Act for injuries due to the owner's negligence despite their being ashore at the time, and *Sieracki, supra*, where longshoremen aboard ship doing seamen's tasks were permitted to recover for unseaworthiness, the Court held that the tort of unseaworthiness arises out of a maritime status or relation and is therefore 'cognizable by the maritime [substantive] law whether it arises on sea or on land.' Accordingly, the court permitted recovery for unseaworthiness. See also *Hagans v. Farrell Lines*, 1956 A.M.C. 2133, 237 F. (2d) 477 (3 Cir.), where the point was assumed in the case involving a longshoreman on the pier struck with sacks of beans when a defective winch did not brake properly.
>
> "In *Robillard, supra*, a longshoreman was injured when, because of unseaworthy stowage and overladen drafts, he was struck by some cargo that was knocked off the deck onto the pier. The court found 'the logic of these authorities *** [*Sieracki, Strika*, etc.] ineluctable' and allowed recovery in unseaworthiness while denying it in negligence."

The failure to provide a safe method of access to and egress from the vessel rendered it unseaworthy.

The shipowner's duty to provide a safe place to work specifically applies to means of getting to and from the vessel. The attention of the Court is directed to *Buch v. United States of America,* (U.S.D.C. S.D.N.Y. 1954) 122 F. Supp. 25, 1954 A.M.C. 1309, where the following appears (1954 A.M.C. at 1310-11):

> "Libelant seeks to recover on both unseaworthiness and negligence. Respondent as owner of the *Bloomquist* was under an absolute and non-delegable duty to crew members to provide a seaworthy ship and safe and seaworthy appliances. It was required to afford libelant a safe means of ingress and egress from the vessel through its own equipment or that supplied by others upon whom it relied. The fact that the barges supplied the ladder when those of the *Bloomquist* were inaccessible and unavailable for use, did not relieve it of its absolute duty to provide a seaworthy vessel and appurtenant appliances and equipment.
>
> "I find that the ladder supplied by the *Comptoir* the only one available for libelant's use, was not reasonably adequate to provide a safe means of egress from the ship to the barge; it was of insufficient length and its bottom rung was three to four feet above the deck of the *Comptoir.* Under the prevailing conditions it was not reasonably fit for the use for which it was intended and was an inadequate appliance and not much different from a totally defective one. The failure of the *Bloomquist* to supply or cause to be supplied

> an adequate Jacobs ladder or other adequate appurtenance for leaving the ship rendered it unseaworthy."
>
> See also *Pettersen v. United States*, (2 Cir. 1955) 324 F. 2d 212, 1955 A.M.C. 1455.

This obligation to provide a safe means of getting to and from the vessel extends beyond the duty to provide a safe ladder or a safe area at the foot of the gangway. It extends to the approaches of the vessel itself. In *Bradshaw v. Carol Ann*, (U.S.D.C. S.D. Tex. 1956) F. Supp. 1958 A.M.C. 1962, plaintiff, a seaman, in order to reach his vessel had to cross the decks of two other vessels moored alongside with the hazards of an open hatch and insufficient lighting. The court said (1958 A.M.C. 965-66):

> "Libelant insists that the warranty of seaworthiness of a vessel, including as it does the duty to provide a safe place to work, extends to the mode of ingress and egress. The *Carol Ann* recognizes that this is so but says that mode of passage furnished here was reasonably safe for the purpose and that the obligation to furnish safe passage applies only to the vessel itself and appurtenances in the immediate area or vicinity and does not extend to an area over which the shipowner has no control, citing among other cases, *Paul v. United States*, (3 Cir.), 1953 A.M.C. 1000, 205 F. (2d) 38, where a seaman fell into a pit on the dock area about 100 feet from the vessel. That was an action for negligence under the Jones Act in which Chief Judge Biggs strongly dissented. It was decided before *Alaska Steamship Co. Inc. v. Petterson*, 347 U.S. 396, 1954 A.M.C. 860, affirming per curiam (9 Cir.) 1953 A.M.C. 1405, 205 F. (2d) 478, imposing strict liability upon

> an unseaworthy vessel regardless of fault or control of the instrumentality causing the injury.
>
> "Here the *Carol Ann* was not moored alongside the dock as was the *El Rancho*, and the injury did not occur on the dock. In order to get to the dock, or return, libelant had to cross over the decks of two vessels with the hazards of an open hatch and insufficient lighting at night. This arrangement between the shipowners was the method chosen, and acquiesced in by the shipowners and the vessels themselves in providing safe passage to the dock and back to the vessel. Thus each 'out' vessel adopted the other for the purpose of safe passage. The 'out' vessel may not have had the power of control of the other vessel but, having adopted the *El Rancho* as part of its own means for safe passage, the *Carol Ann* became liable, irrespective of control or knowledge of the conditions on the *El Rancho*.
>
> "While the *Carol Ann's* failure to inspect the means of passage could be said to be negligence, this does not mean that the vessel was unseaworthy (sic) since unseaworthiness can be created by negligence."

Appellant was on the business of the ship at the time of the accident.

At the time of the injury with which we are concerned, appellant was proceeding down the pier for the purpose of getting a hair cut. It was as much on ship's business as though he were carrying ship's documents to a shoreside agent. This has been settled law for over twenty three years. In *Aguilar v. Standard Oil Company,* (1943) 318 U.S. 724, 87 L. Ed. 1107, 63 S. Ct. 930, 318 U.S. pp. 733-734, the Court said:

> ". . . Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. . ."
>
> "The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If, in those surroundings, the seaman incurs injury, it is because of the voyage, *the shipowner's business. That business* has separated him from his usual places of association. By adding this separation to the restrictions of living as well as working aboard, it forges dual and unique compulsions for seeking relief wherever it may be found. *In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of employment."* (Emphasis added)

Although *Aguilar* was a maintenance and cure case its teachings are equally applicable to a cause of action based on unseaworthiness.

In *Marceau v. Great Lakes Transit Co.,* (2 Cir. 1945) 146 F. 2d 416, 1945 A.M.C. 223, a cook and member of the crew who had gone ashore for personal business or recreation was injured while returning to the vessel when he slipped upon foreign matter on the dock. Defendant contended that the court was without jurisdiction because: (1) Plaintiff had sought and received compensation under the New York Workmen's Compensation Act, (2) that plaintiff was not injured in the course and scope

of his employment and (3) that Jones Act did not extend to accident on the dock. After disposing of the first contention the Court said (1945 A.M.C. 225):

> "The defendant's other two contentions are likewise without merit. The plaintiff was acting under orders when he returned to the ship. Consequently at the time of the accident he was not only acting in the course of his employment but suffered his injuries while on property in the possession and under the control of the defendant as lessee over which the plaintiff had to pass in order to return to his work. Under the decisions a man is acting in the course of his employment when coming to or returning from work, and upon the employer's premises or upon adjacent property if approaching by a customary route. *Wong Bar v. Suburban Petroleum Transport*, 1941 A.M.C. 844, 119 F. (2d) 745 (2CCA). In *Erie R. R. Co. v. Winfield*, 244 US 170, the Supreme Court held that a railroad employee was engaged in interstate commerce and could recover for injuries sustained through the negligence of the railroad when incurred while leaving his work for the day and passing through the freight yard of the railroad. See to the same effect: *Virginia Ry. Co. v. Early*, 130 F. (2d) 548 (4CCA); *Young v. New York N. H. & H. R. R. Co.*, 74 F. (2d) 251, at p. 252 (2CCA); *Atlantic Coast Line Ry. Co., v. Williams*, 284 Fed. 262 (5CCA). In *Cudahy Co. v. Parramore*, 263 U.S. 418, 426, the Supreme Court allowed an employee to recover workman's compensation for injuries suffered as in the course of his employment when he necessarily was going to his employer's factory and was killed by a locomotive on a railroad adjacent to the plant. See also *Bountiful Brick Co. v. Giles*, 275 U.S. 154, 158. The recent decision of the Supreme Court in *O'Donnel v. Great Lakes Co.*, 318 U.S. 36, 1943 A.M.C. 149, extends the protection of the Jones Act to seamen who are injured through the negligence of their employers while

> acting in the course of their employment even though the injuries occur on land. Chief Justice Stone, writing for the Court, said: 'The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.'"

The language of the Supreme Court in *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129, 80 S. Ct. 247, is dispositive of this question. The Court said at page 132-133:

> "The fact that the injury did not occur on the vessel is not controlling, as *Senko v. LaCrosse Dredging Corp*, *supra*, 352 U.S. 373, 77 S. Ct. 417, holds. As 'seaman' may be sent off ship to perform duties of his employment. *O'Donnell v. Great Lakes Transit Corp.*, 2 Cir., 146 F. 2d 416, a ship's cook was allowed to recover under the Jones Act when, pursuant to duty, he was returning to the ship and was injured on the dock while approaching a ladder used as ingress to the vessel.
>
> "We held that a seaman who was injured on the dock while departing from the ship on shore leave was in the service of the vessel and was entitled to recover for maintenance and cure in *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 63 S. Ct. 930, 87 L. Ed. 1107. It was there recognized that a seaman is as much in the service of his ship when boarding it on first reporting for duty, quitting it on being discharged, or going to and from the ship while on shore leave, as he is while on board at high sea. Id. 318 U.S. at pages 736-737, 63 S. Ct. at pages 936-937. We also held that a seaman injured in a dance hall while on shore leave was in the service of his ship in *Warren v. United States*, 340 U.S. 523, 529, 71 S. Ct. 432, 436, 95 L. Ed. 503. These two cases were not

> brought under the Jones Act but involved maintenance and cure. Yet they make clear that the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships. They also supply relevant guides to the meaning of the term 'course of employment' under the Act since it is the equivalent of the 'service of the ship' formula used in maintenance and cure cases. See Gilmore and Black, *The Law of Admiralty*, p. 284, and see *O'Donnel v. Great Lakes Co., supra*, 318 U.S. at page 43, 63 S. Ct. at page 492; *Marceau v. Great Lakes Transit Corp. supra.*"

IX

ERRORS OF INSTRUCTION EXCEPTED TO REQUIRE THE REVERSAL OF THE JUDGMENT BELOW

After the jury had been instructed, counsel for appellant in the absence of the jury excepted to certain of the instructions as given and certain of the instructions given as modified. Upon reflection it is not our desire to press all of these exceptions by this appeal. However, certain of them are, we believe, of such magnitude as require the reversal of the judgment below. These exceptions are noted in reporter's transcript pp. 257-258.

A. The exception to the giving of appellant's proposed instruction number two, as modified was well taken.

The instruction as proposed read as follows, the italicized portions representing the matters stricken by the Court (C.T. 124-125):

> "Plaintiff is an American merchant seaman and has brought this action to recover damages from his employer, a shipowner, for personal injuries plaintiff claims to have suffered as a result of the negligence of the employer and the unseaworthiness of its vessel the *S/S Santa Flavia.*
>
> "Plaintiff has set forth his case in three separate and distinct claims or causes of action.
>
> "First, plaintiff claims that the shipowner was negligent under the Jones Act in failing to furnish him with safe and proper means of passage along the dock near which the vessel was moored when he took shore leave. Plaintiff claims a duty was imposed upon the employer to provide safe passage on the dock, and that the employer failed to fulfill its duty in this respect. Plaintiff claims that the shipowner either knew, or by the exercise of reasonable care, should have known of the unsafe condition on the dock, and taken steps to warn him or otherwise protect his safety.
>
> *"If you should find from the facts of the case and based upon a preponderance of the evidence, and applying the law set forth in these instructions, that such a duty of care was imposed upon the shipowner, but that it failed to discharge its duty, and thereby injury was caused to plaintiff, then a verdict in plaintiff's favor is warranted.*
>
> "Second, plaintiff claims that after he was injured, the shipowner was negligent under the Jones Act in failing to provide him with necessary and proper medical care and

attention and required him to continue working instead of relieving him from duty, thereby causing him additional personal injury.

"If you should find such claims supported by a preponderance of the evidence in the case and justified by the law set forth in these instructions, then a verdict in plaintiff's favor on this cause of action is warranted.

"Third, plaintiff claims that the vessel was unseaworthy in not furnishing him with necessary and proper medical care and attention and in requiring him to continue working instead of relieving him from duty, after he was injured, thereby causing him additional personal injury.

"While this claim on a factual basis is similar to plaintiff's second cause of action, it is different in legal theory. Therefore, if you find that plaintiff's factual contentions are supported by a preponderance of the evidence and that the applicable law relating to absolute liability of a shipowner for unseaworthiness, set forth in these instructions, warrants such a result, a verdict in plaintiff's favor would be proper.

"While plaintiff has set forth three separate and distinct claims, he is claiming and is entitled to only a single monetary recovery and that is true whether such recovery is required or supported by any one or more of the theories plaintiff has advanced."

Jones Act (Act. of June 5, 1920, c. 250 sec. 33, 41 Stat. 1007) Liability of shipowner employer under the Jones Act for injury because of unsafe condition of dock.

O'Donnell v. Great Lakes Dredge & Dock Co., (1943) 318 U.S. 36, 87 L. Ed. 596, 63 S. Ct. 488, 1943 A.M.C. 150.

Aguilar v. Standard Oil Co., (1943) 318 U.S. 724, 63 S. Ct. 930, 87 L. Ed. 1107, 1943 A.M.C. 4.

Braen v. Pfeifer Transp. Co., (1959) 361 U.S. 129, 80 S. Ct. 247, 1960 A.M.C. 2.

Hopson v. Texaco Inc., (1966) 383 U.S. 262, 15 L. Ed. 2d 740, 86 S. Ct. 765, 1966 A.M.C. 281.

Marceau v. Great Lakes Transit Co., (2 Cir. 1945) 146 F. 2d, 416, 1945 A.M.C. 223 cert. den. 324 U.S. 872.

Liability of shipowner employer for negligent failure (under the Jones Act) to furnish necessary and proper medical care and attention:

Cortes v. Baltimore Insular Lines,(1932) 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368, 1933 A.M.C. 9.

DeZon v. American President Lines, (1942) 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065, 1943 A.M.C. 483.

Nordyke v. Van Camp Sea Food Co., (9 Cir. 1944) 140 F. 2d 902, 1944 A.M.C. cert. den. 322 U.S. 760.

Liability of shipowner employer under the unseaworthiness doctrine for failure to provide proper medical care and attention:

The IROQUOIS, (1904) 194 U.S. 240, 24 S. Ct. 640, 48 L. Ed. 955.

Cortes v. Baltimore Insular Lines, supra.

Boudoin v. Likes Bros. Steamship Co., (1955) 348 U.S. 336, 99 L. Ed. 354, 75 S. Ct. 382, 1955 A.M.C. 488.

Gutierrez v. Waterman Steamship Co., (1963) 373 U.S. 206, 10 L. Ed. 2d 297, 83 S. Ct. 1185, 1963 A.M.C. 1649.

Mitchell v. Trawler Racer Inc.,(1960) 362 U.S. 539, 4 L. Ed. 2d 941, 80 S. Ct. 926, 1960 A.M.C. 1503.

See generally, Gilmore & Black, "The Law of Admiralty" (Foundation Press, Brooklyn, 1957) pp. 308-332. The authors discuss negligence and unseaworthiness as related to seamen's personal injury actions, and the merging character of the doctrines.

A seaman may state his case on as many and diverse theories as he can muster and may recover on a factual showing which supports any one of them:

Fitzgerald v. United States Lines,(1963) 373 U.S. 16, 10 L. Ed. 2d 720, 83 S. Ct. 1646, 1963 A.M.C. 1093.

McCarthy v. American Eastern Corp. (1949) 175 F. 2d 724.

Belado v. Likes Bros. Steamship Co., (2 Cir. 1950) 169 F. 2d 943, 1950 A.M.C. 609.

Williams v. Tide Water Associated Oil Co., (Cir.9 1955) 227 F. 2d 791, 1956, A.M.C. 136.

The instructions as given by the court merely set forth appellant's contentions. The charge totally failed in the portion which was of significance, i.e., the legal result which must flow if such contention were proved.

It is hornbook law that every party, upon request, is entitled to instructions of every theory of the case having substantial support in the evidence. *Sills v. Los Angeles Transit Line*, (S.Ct. Calif. 1953) 40 Cal. 2d 630, 255 P. 2d 795;

Daniels v. City and County of San Francisco, (S. Ct. Calif. 1953) 40 Cal. 2d 614, 255 P. 2d 785.

> *The exception to appellant's instruction number six as given was well taken.*

Appellant's Instruction No. six reads as follows, the italicized portion being stricken by the court (C.T. 134):

> "The defendant shipowner was acting by and through the master of the vessel in this case. The shipowner entrusted the management, operations and control of the vessel to the master and his acts, or failure to act, are considered in law to be the acts, or failure to act, of the defendant itself.
>
> *"Therefore, if you should find from a preponderance of the evidence in this case that the master was in any way negligent in the management or operation of the ship, or in failure to provide safe and proper passage on the dock where the vessel was berthed, or in failing to provide plaintiff with necessary and proper medical care and attention, and that such negligence, in whole or in part, caused plaintiff's accident, or worsened his physical condition, the defendant is personally liable therefore, and a verdict against the defendant would be justified in such circumstances."*

> *Mahnich v. Southern Steamship Co.* (1955) 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561, 144 A.M.C. 1.

This is subject to the same exception as the preceding instruction complained of as modified. The court has failed to apprise the jury of the legal consequences which flow from the dereliction of the master of the vessel.

The exception to appellant's instruction number twenty-eight as given was well taken.

The instruction as proposed read as follows (the italicized portion being stricken by the court) C.T. 129:

> "If the defendant shipowner in this case was negligent, and its negligence was a proximate cause of the accident to plaintiff, the shipowner is liable in damages even though the owner's negligence was not the sole proximate cause of the injury, and even though the negligence of some third person, neither the injured plaintiff or the shipowner, and in this case, the Mexican government, contributed in equal, greater or lesser degree, in causing the injury.
>
> *"Thus, if the shipowner was negligent and such negligence was a cause of the accident to plaintiff, even though there may have been negligence of a third person such as the Mexican government which also was a cause of the accident, the defendant would still be fully liable."*
>
> BAJI 301-F (adapted)
>
> *Scott v. Isbrandsten Co.,* (4 Cir. 1964) 327 F. 2d 113, 1964 A.M.C. 1126 ("***The jury could consider not only the ship's unseaworthiness and Isbrandsten's negligence in arriving at a determination of proximate cause, but also any *concurrent* negligence on the part of the longshoremen, which proximately caused or proximately contributed to the accident. 1964 A.M.C. p. 1138.)

This modification is subject to the same objection previously made that the court failed to apprise the jury of the legal affect of the negligence of the shipowner in the event that the Mexican government was also negligent.

The refusal of the court to give appellant's proposed instructions numbered twenty-four and seventeen require a reversal in this case.

The case presented to the jury involved a field of law with which we would not reasonably expect them to be familiar. As Judge Hale observed in *Sullivan v. Lyons Steamship Ltd.*, (S. Ct. Wash. 1963) 387 P. 2d 776-77:

> "The sea is a strange and wonderous thing, and equally so is the law it inspires..."

Peculiar to the law of the sea is the fact that a shipowner owes a higher degree of care to seamen than does a shoreside employer of labor. The jurors oriented as they are by experience and perhaps from instruction in other cases, absent intelligence from the court would naturally hold defendant in this case only to a duty to exercise ordinary care. Appellant's proposed instruction number 24 (C.T. 183-84) correctly sets forth the law. This instruction reads:

> "A higher degree of care is required of employers of seamen with regard to providing them with a safe and proper place in and about which to work, with safe and proper working conditions, with safe, proper and sufficient appliances, gear, equipment, and tackle, and with competent, careful and sufficient officers, fellow workers and supervision, than is required of employers of workers on land engaged in comparable duties.

"The reason for this rule is that work on board or in connection with ships is more hazardous and dangerous, generally speaking, than similar work ashore.

Armit v. Loveland, (3 Cir. 1940) 115 F. 2d 308, 1940 A.M.C. 1429 ("The same peculiar circumstances attending the employment alike require that the rules of the commonlaw respecting proof of negligence of the employer be not visited too rigorously upon seamen. Stated conversely, *a higher degree of care is required of the employers of seamen than is required of employers of servants for work ashore.*")

The STATE OF MARYLAND, (4 Cir. 1936) 85 F. 2d 944, A.M.C. ("In requiring that seamen on a voyage who became ill or were injured in the service of the vessel should be supported and cared for and paid their wages until recovery, the maritime law provided for them *a more humane and effective remedy than was afforded by the common law to the employees on land.* *** With the advent of steam navigation * * vessels were no longer the simple sailing ships, of whose seaworthiness the sailor was an adequate judge, but were full of complicated and dangerous machinery, the operation of which required the use of many and varied appliances and a high degree of technical knowledge. * * *The duty of the vessel and her owners to the seaman, in this new age of navigation extended beyond mere maintenance and cure;* * * the owners owed to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition; and that *for failure to discharge such duty there was liability on the part of the vessel and her owners to a seaman* suffering injury as a result thereof.")

The H. A. SCANDRET, (2 Cir. 1937) 87 F. 2d 708, 1937 A.M.C. 326. ("A ship is an instrumentality full of *internal hazards* aggravated, if not created, by the uses to which she is put. It seems to us that everything is to be said for

holding her absolutely liable to her crew for injuries arising from defects in her hull or equipment. The liability can be covered by insurance and is *better treated as an expense of the business than one left to an uncertain determination of courts in actions to recover for negligence.* Circuit Judge Augustus N. Hand.")

Krey v. United States, (2 Cir. 1941) 123 F. 2d 1008, 1942 A.M.C. 19. (" * * The existence of such unseaworthy conditions may very well be *found under circumstances which might not be considered unsafe on land because of the increased risks in the circumstances and of the traditional protection accorded seamen as wards of the admiralty.")*

Storgard v. France & Canada Steamship Corp., (2 Cir.) 263 F. 545.

Braen v. Pfeifer Oil Transp. Co., (1959) 361 U.S. 129, 1960 A.M.C. 2. (" * * The scope of a seaman's employment or the activities which are related to the furtherance of the vessel are *not measured by the standards applied to land-based employment relationships.")* (1960 A.M.C. p. 5.)

Appellant's instruction number seventeen (C.T. 177-78) reads as follows:

> "In determining the question of shipowner negligence under the Jones Act, you may consider all the factors and circumstances in the case as follows: the frequency with which and over what period of time the ship in this case or the company's ships generally called at the port or dock in question; the fact that it was a foreign port; the factor of whether the shipowner or its master knew or by the exercise of reasonable care should have known of any unsafe condition on the dock; the factor of the ship's knowledge that crew members would take shore leave and use the passageway in

> question; the matter of whether the shipowner or master had the opportunity to warn the crew of unsafe conditions on the dock and to furnish them with safeguards, such as flashlights but failed to do so; the question of whether the shipowner requested or could have requested the Mexican government to repair or guard against any unsafe condition on the dock, and whether the Mexican government would have heeded such a request; the factor of how frequently and over what period of time the master of the *S/S SANTA FLAVIA* had been at the port, and over the dock in question; the factor of whether the vessel's agents knew or should have known of any unsafe condition of the dock and should have warned the ship and its crew concerning the condition, or taken steps through the Mexican government to have the situation corrected; these, and any other factors which would be relevant can be considered by you in deciding whether there was "operational negligence" on the part of the shipowner in the context of this case which would indicate it had failed to discharge its "duty of care" to the ship's crew.
>
> *Crumady v. The JOACHIM HENDRIK FISSER,* (1959) 358 U.S. 423, 3 L. Ed. 2d 413, 79 S. Ct. 445, 1959 A.M.C. 580.
>
> *Blassingill v. Waterman Steamship Corp.,* (9 Cir. 1964) 336 F. 2d 367, 1964 A.M.C. 1932.
>
> *Thompson v. Calmar S.S. Corp.,* (3 Cir. 1964) 331 F. 2d 657, 1964 A.M.C. 2249.
>
> *Scott v. Isbrandtsen Co.,* (4 Cir. 1964) 327 F. 2d 113, 1964 A.M.C. 1126.

We are satisfied that the instant case is one involving operational negligence. The positioning of the ship, the lighting afforded and the hole existing in the dock all combine to create a dangerous condition. The cases dealing

with "operational negligence" primarily are cases which hold the vessel unseaworthy because of "operational negligence", however, as Gilmore and Black observed in their work, "The Law of Admiralty", page 230:

> "...Experience shows that whatever is accepted as 'unseaworthy' sooner or later becomes 'negligence' and vice versa."

Briefly, the doctrine of operational negligence is that where a proper undertaking or proper equipment is improperly employed so as to create a dangerous condition, "operational negligence" results. We find "operational negligence" cases -- though not necessarily so designated -- as early as 45 years ago. In *Carlisle Packing Co. v. Sandanger*, (1922) 259, U.S. 255, the vessel left the dock without adequate life preservers and with a can containing gasoline but marked "coal oil". Plaintiff used the contents of the can to start a wood fire. An explosion resulted. Because of the absence of life preservers, he delayed jumping in the water to put out the flames which enveloped his body thus making his injuries from burns more severe. The Supreme Court held that the trial court should have instructed the jury that the absence of life preservers and mislabeling of the can made the vessel unseaworthy. No matter how you analyze the case it is one of operational negligence.

In *Mahnich v. Southern Steamship Co.*, (1944) 321 U.S. 96, an unsound rope was selected to rig a staging when sound rope was available. The shipowner contended that the vessel was not unseaworthy because of the availability of sound rope and the accident was due solely to the mate's negligence. The Supreme Court held since due diligence did not relieve a ship from its duty to furnish adequate appliances, the operational negligence in supplying the unsound rope did not excuse the ship for the unseaworthy condition.

Based upon the foregoing, we have the expansion of the doctrine in *Crumady*, *Blassingill*, *Thompson* and *Scott (supra)* as authority for the proposed instruction.

As we have heretofore pointed out, appellant was entitled to have the jury instructed as to every theory of his case which might find support in the evidence. (*Montgomery v. Virginia Stage Lines*, [CADC, 1951] 191 F. 2d 770.)

We respectfully submit that the failure to give requested instructions seventeen and twenty-four requires a reversal of the judgment on the first cause of action.

X

CONCLUSION

It is submitted that the court below erred in granting the motion for judgment of dismissal of the pleadings of the third cause of action based upon unseaworthiness. Under the applicable law, the determination of whether or not the vessel was unseaworthy by reason of the conditions existing on the dock, was a question of fact to be determined by the jury in the light of all the evidence. In the existing state of the law, it was clearly erroneous to determine as a matter of law that no cause of action was stated.

The errors of instruction complained of necessitate reversal of the judgment entered on the first cause of action based on negligence. The court by deleting portions of instructions submitted by Appellant failed to apprise the jury of the law which applied to the facts adduced in evidence. By failing to give Appellant's instructions twenty-four and seventeen as requested by Appellant, he was deprived of complete instruction on his theories of the case.

Appellant was entitled to an instruction on operational negligence and to an instruction on the duty owed him by his employer.

For the foregoing reasons it is respectfully submitted that the judgment entered on the first and third causes of action should be reversed.

Dated: San Francisco, California, September 18, 1967.

DORSEY REDLAND
VAN H. PINNEY

BY ______________________________
DORSEY REDLAND
Attorney for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of the within Brief, I have examined Rules 18 and 19 & 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my Opinion, the within Brief is in full compliance with those Rules.

DORSEY REDLAND
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